No. 82-2008

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT M. NESMITH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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TABLE OF AUTHORITIES

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Petitioner seeks review of the decision of the court of appeals holding that the Commissioner could rely on the provisions of Section 6501(c)(1) of the Internal Revenue Code of 1954 (26 U.S.C.), allowing the assessment of deficiencies "at any time" in the "case of a false or fraudulent return," where petitioner had filed fraudulent returns for the years in question but had later filed nonfraudulent amended returns.

1. Petitioner and his wife filed joint income tax returns for the years 1970, 1971, and 1972 that concededly were fraudulent. In December 1973, after the Commissioner had initiated an investigation of petitioner and his wife for the years in question, they filed nonfraudulent amended returns for those years and remitted the additional amounts of tax due under the amended returns (Pet. App. 2a). The Commissioner held the remitted funds but did not then assess the additional amounts of taxes shown on the amended returns.

Thereafter, petitioner was indicted for willfully attempting to evade or defeat a part of his income taxes for each of the years in question. On February 22, 1977, petitioner pleaded nolo contendere to one count of willfully attempting to evade or defeat federal income taxes in violation of Section 7201 of the 1954 Code (Pet. 5).

On November 18, 1977, the Commissioner assessed the additional taxes shown due on the amended returns and credited the amounts previously remitted against those taxes. In addition, on December 1, 1978, the Commissioner issued a notice of deficiency to petitioner and his wife determining deficiencies in tax (because of the disallowance of certain deductions on the amended returns) and civil fraud penalties under Section 6653(b) of the 1954 Code for each of the years in question.

In this proceeding brought by him in the Tax Court, petitioner contended that the Commissioner's assessment of the amounts shown due on the amended returns and his determination of additional deficiencies and penalties were time-barred under Section 6501(a) of the 1954 Code because the assessments were made and the deficiency notice was issued more than three years after the amended returns were filed. The Tax Court, adhering to its decision in *Klemp* v. *Commissioner,* 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.), upheld petitioner's position that the deficiencies shown on the statutory notice were time-barred. The Tax Court also agreed with petitioner's further argument that it had jurisdiction to determine overpayments with respect to the amounts remitted with the amended returns and that petitioner was entitled to recover those amounts because the assessments were untimely (Pet. App. 6a-21a).

The court of appeals reversed and remanded (Pet. App. 1a-4a). Following the reasoning set forth by the Third Circuit in *Badaracco* v. *Commissioner* and *Deleet Merchandising Corp.* v. *United States,* 693 F.2d 298 (1982), cert.

granted, Nos. 82-1453 and 82-1509 (May 16, 1983), the court held that the filing of nonfraudulent amended returns did not trigger the running of the general three-year statute of limitations under Section 6501(a), and that the Commissioner still remained free to assess "at any time" the correct liability for a year for which a false or fraudulent return had been filed, pursuant to the provisions of Section 6501(c)(1) of the 1954 Code.[1]

2. The question presented to the court of appeals in this case—whether the filing of nonfraudulent amended returns following the filing of fraudulent original returns starts the running of the three-year statute of limitations under Section 6501(a) of the 1954 Code—is the same as that presented in *Badaracco* v. *Commissioner* and *Deleet Merchandising Corp.* v. *United States, supra.*[2] The decision of the court of appeals below, holding in favor of the Commissioner on this question, is in accord with the Third Circuit's decision in *Badaracco* and *Deleet Merchandising,* but conflicts with

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[1]The Commissioner had argued, in the alternative, that the assessments and notice of deficiency were timely by virtue of consent agreements executed by petitioner and by virtue of the six-year limitations period provided by Section 6501(e) of the 1954 Code (26 U.S.C. (& Supp. V)) in the case of omissions of 25% of reported income. The court of appeals had no occasion to consider this alternative argument because of its decision on the primary issue (see Pet. App. 4a n.3).

[2]Petitioner also lists as a question presented (Pet. I) whether he may be entitled to a refund in this case on the ground that the taxes paid with the amended return were not formally assessed within three years of the filing of those returns. As he notes (Pet. 8 n.3), however, this issue, which arises only if the court of appeals is mistaken on the primary issue and the three-year limitations period does apply here, was decided in his favor by the Tax Court, and the Commissioner did not appeal on that point. Thus, the issue was not before the court of appeals and is not before this Court.

the decisions of the Tenth Circuit in *Dowell* v. *Commissioner*, 614 F.2d 1263 (1980), petition for cert. pending, No. 82-1873, and the Second Circuit in *Britton* v. *United States*, 697 F.2d 288 (1982), aff'g mem., 532 F. Supp. 275 (D. Vt. 1981).

For the reasons more fully set forth in our brief in response to the certiorari petitions in *Badaracco* and *Deleet Merchandising*, we agree with the court below that the filing of a nonfraudulent amended return does not start the running of the ordinary three-year statute of limitations under Section 6501(a) of the 1954 Code where a fraudulent return for the year in question was filed in the first instance. Rather, we contend that, in such circumstances, the provisions of Section 6501(c)(1) permitting assessment "at any time" in the case of a false or fraudulent return continue to apply. However, because the decision on the merits in *Badaracco* and *Deleet Merchandising* will also be controlling in this case, it is appropriate for the Court to hold the petition in this case for disposition in accordance with the decision in those cases.[3]

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[3]Petitioner suggests (Pet. 9) that this petition should be granted and the case consolidated with *Badaracco* and *Deleet Merchandising* so that the Court may consider the alternative question raised by the Commissioner below concerning the six-year statute of limitations under Section 6501(e) (26 U.S.C. (& Supp. V)). As noted above (see note 1), the court of appeals did not reach that alternative question. Although the Tenth Circuit has rejected the Commissioner's position on the Section 6501(e) issue (*Dowell* v. *Commissioner, supra*, 614 F.2d at 1267), no other court of appeals has addressed it, and thus there is no particular need for Supreme Court review at this time. Moreover, if the Court accepts the Commissioner's argument in *Badaracco* and *Deleet Merchandising* that taxes may be assessed at any time where the original returns were fraudulent, the Section 6501(e) issue in the present case will be moot. If this Court rejects the Commissioner's position in *Badaracco* and *Deleet Merchandising*, the Section 6501(e) issue would remain

Respectfully submitted.

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AUGUST 1983

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open for consideration by the court of appeals on remand. In these circumstances, it would be premature for the Court to grant review on the Section 6501(e) issue.

We are serving a copy of this response upon counsel for the petitioners in *Badaracco* and *Deleet Merchandising*, and counsel for the respondent in *Dowell*. We are also furnishing a copy of our brief acquiescing in the grant of the petitions in *Badaracco* and *Deleet Merchandising* and a copy of our petition in *Dowell* to counsel for the petitioner in this case.